

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:)
Asarco Hayden Plant Site)
Residential Yard Removal Site)
)
Gila County, Arizona)
)
)
ASARCO LLC,)
Respondent)
_____)

ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMOVAL ACTION

U.S. EPA Region IX
CERCLA Docket No. 2008-09

Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, as amended, 42 U.S.C. §§
9604, 9606(a), 9607 and 9622

TABLE OF CONTENTS

I.	JURISDICTION AND GENERAL PROVISIONS	1
II.	PARTIES BOUND	1
III.	DEFINITIONS.....	2
IV.	FINDINGS OF FACT	3
V.	CONCLUSIONS OF LAW AND DETERMINATIONS.....	5
VI.	SETTLEMENT AGREEMENT AND ORDER	5
VII.	DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND REMEDIAL PROJECT MANAGER	6
VIII.	WORK TO BE PERFORMED	7
IX.	SITE ACCESS	10
X.	ACCESS TO INFORMATION	11
XI.	RECORD RETENTION	12
XII.	COMPLIANCE WITH OTHER LAWS	12
XIII.	EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES	13
XIV.	AUTHORITY OF ON-SCENE COORDINATOR.....	13
XV.	PAYMENT OF OVERSIGHT COSTS.....	13
XVI.	DISPUTE RESOLUTION	15
XVII.	FORCE MAJEURE	15
XVIII.	STIPULATED PENALTIES	16
XIX.	COVENANT NOT TO SUE BY EPA	18
XX.	RESERVATIONS OF RIGHTS BY EPA	19
XXI.	COVENANT NOT TO SUE BY RESPONDENT.....	20
XXII.	OTHER CLAIMS	21
XXIII.	CONTRIBUTION.....	21
XXIV.	INDEMNIFICATION	22
XXV.	INSURANCE	22
XXVI.	FINANCIAL ASSURANCE.....	23
XXVII.	MODIFICATIONS	23
XXVIII.	NOTICE OF COMPLETION OF WORK.....	23
XXIX.	SEVERABILITY/INTEGRATION/APPENDICES	24
XXX.	EFFECTIVE DATE.....	24

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Asarco, LLC ("Respondent"). This Settlement Agreement provides for the performance of a Removal Action and the reimbursement of certain oversight costs incurred by the United States at or in connection with specified properties in Hayden and Winkelman, Arizona (the "Properties" or "Removal Site"), as listed in the Removal Action Memo. Attachment 1.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA"). These authorities have been delegated to the EPA Region IX Branch Chiefs via Delegation 14-14-C and Region IX Order R9 1290.15, dated September 29, 1997.

3. EPA has notified the State of Arizona (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that Respondent will not contest the basis or validity of this Settlement Agreement or its terms.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondent.

6. Respondent is liable for carrying out all activities required by this Settlement Agreement.

7. Respondent shall ensure that any contractors, subcontractors, and representatives involved in implementation of this Removal Action receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the attachment attached hereto and incorporated hereunder, the following definitions shall apply:

- a) "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*
- b) "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- c) "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXX.
- d) "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies to EPA of the United States.
- e) "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- f) "Oversight Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs or has incurred in reviewing or developing plans, reports and other items related to the Removal Action, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 26 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), and Paragraph 36 (emergency response) and Paragraph 61 (work takeover).
- g) "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.
- h) "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

- i) "Properties" or "Removal Site" shall mean the properties in Hayden and Winkelman, Arizona listed in Section A of the Removal Action Memo. Attachment 1.
- j) "Parties" shall mean EPA and Respondent.
- k) "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).
- l) "Removal Action" shall mean the removal action described in the Removal Action Memo. Attachment 1.
- m) "Respondent" shall mean ASARCO LLC and its successors and assigns.
- n) "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- o) "Site" or "Asarco Hayden Plant Site" shall mean the Asarco Hayden Smelter and associated facilities owned or operated by Respondent in Hayden, Arizona, and any area where hazardous substances from those facilities have come to be located.
- p) "State" shall mean the state of Arizona.
- q) "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" or "hazardous substance" under California law.
- r) "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement.
- s) "Work Plan" shall mean the approved Work Plan for implementation of the investigation required by this Settlement Agreement, and any modifications made thereto in accordance with this Settlement Agreement.

IV. FINDINGS OF FACT

9. ASARCO, LLC owns and operates a set of facilities which includes a crusher, a concentrator, an overland conveyor, an active smelter, property with tailings piles, and other nearby properties in Hayden and Winkelman, Arizona. Asarco's facilities surround the town of Hayden, with a population of 900, and they are on two sides of the town of Winkelman, with a population of 450. Kearny, Arizona, with a population of approximately 2,250, is approximately 9 miles northwest of the facility. Hayden is located near the intersection of Highway 177 and Route 77, approximately 100 miles southeast of Phoenix and 52 miles northeast of Tucson.

Winkelman is located approximately one mile southeast of Hayden. Releases from the Asarco facilities have caused hazardous substances, including arsenic, copper, and lead, to come to be located within the residential portions of Hayden and Winkelman. This Removal Action addresses contamination in the soil of the 15 residential properties in Hayden and Winkelman which have been shown to have the highest concentrations of these hazardous substances ("Removal Site").

10. In 2004, the EPA Emergency Response Section (ERS) under the authority of CERCLA, contracted Ecology & Environment Inc. to perform additional sampling in the Hayden area. Specific details of the scope of work, results, and conclusions from the removal assessment (RA) are provided in the ASARCO Hayden Removal Assessment: Final Report (Ecology & Environment, Inc., 2004) ("RA"). The objective of the RA was to continue to identify and address levels of metals contaminants contained in soil resulting from operations at the Asarco Hayden Plant Site, and specifically to evaluate impacts on the communities of Kearny, Hayden, and Winkelman. The investigation was focused on determining levels of metals contamination within residential, commercial, and public areas of the three towns.

11. Soil samples were collected at a total of 51 locations in Hayden and 69 locations in Winkelman from randomly selected locations within an established grid. Background samples were collected at six locations along State Route 77 south of Winkelman. Surficial samples were collected to depths of approximately two inches below ground surface. Total metal analyses revealed elevated levels of arsenic, copper, and lead in many of the sampled locations in both towns. The RA concluded that surficial soil contamination is present in the towns of Hayden and Winkelman, warranting a Remedial Investigation (RI) including soil sampling focused on residential yards in both towns.

12. As part of the RI, residential soil sampling activities were conducted and included the collection of soil samples from the yards of 130 habitable homes within Hayden and Winkelman. This total consisted of 99 yards in Hayden and 31 yards in Winkelman. The residential soil sampling activities were conducted between January 30, 2006 and February 17, 2006.

13. Data collected from the surficial soil sampling at Hayden and Winkelman residential properties conducted as part of the RI indicates that the primary metals of concern are arsenic, copper, and lead. At least one sample from each sampled residential property was submitted for laboratory analysis. Based on the laboratory results of the 99 yards sampled in Hayden, 67 yards had arsenic concentrations that exceeded the Soil Remedial Level ("SRL") of 10 mg/kg, 77 yards had copper concentrations that exceeded the SRL of 2,800 mg/kg, and 16 yards had lead concentrations that exceeded the SRL of 400 mg/kg. Of the 32 yards sampled in Winkelman, two yards had arsenic concentrations that exceeded the SRL. A small number of residential properties showed exceedences of SRLs for other metals, but none of these metals are widespread at elevated concentrations. In general, the highest concentrations of metals in soils were found in residential properties located closest to the active concentrator facility and the former Kennecott smelter. The RI indicated that 15 such properties had particularly high concentrations of arsenic, copper, and lead, exceeding the Removal Action Objectives explained in the Removal Action Memo.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

14. Based on the Findings of Fact set forth above, and the Administrative Record supporting this Removal Action, EPA has determined that:

- a) The Removal Site and the Site are each a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b) The contamination found at the Removal Site, as identified in the Findings of Fact above, includes hazardous substances as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- c) Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- d) Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for performance of response action and for response costs incurred and to be incurred at the Removal Site. Specifically, Respondent is the current owner and operator of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).
- e) The conditions described in Section A(4) of the Removal Action Memo constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
- f) The Removal Action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. SETTLEMENT AGREEMENT AND ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

**VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR,
AND EPA PROJECT MANAGER**

15. Respondent shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within three (3) days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least three (3) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within ten (10) days of EPA's disapproval. The proposed contractor(s) must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by EPA.

16. Within three (3) days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within five (5) days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

17. EPA has designated Martin Powell of the Region IX Response, Planning and Assessment Branch as its On Scene Coordinator ("OSC") for the Removal Action and as its Project Manager for the actions required by this Settlement Agreement. Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the OSC via U.S. Mail at 1110 West Washington Street, Phoenix, Arizona, 85007 and contemporaneously at Powell.Martin@epa.gov. EPA and Respondent shall have the right, subject to Paragraph 16, to change their respective designated OSC or Project Coordinator. Respondent shall notify EPA five (5) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

18. Respondent shall perform, at a minimum, all actions necessary to implement the Removal Action generally described in the Removal Action Memo, Attachment 1. The actions to be implemented generally include, but are not limited to, the following:

- a. Obtain access agreements from the owners and tenants of the Properties.
- b. Document existing physical conditions of each of the Properties, and develop restoration plans for each of the Properties.
- c. Excavate soil at the Properties, so that remaining soil has levels of copper, lead, and arsenic that are no higher than background or SRLs, or to a maximum depth of 24 inches, at the discretion of the OSC.
- d. Conduct confirmatory sampling and analysis.
- e. Transport and dispose of excavated soil.
- f. Remove dust containing hazardous substances from the interior of residences, in those residences where the OSC determines it necessary to prevent potential exposures to residents.
- g. Provide for temporary relocation of residents as deemed necessary by the OSC.
- h. Restore properties to pre-removal condition per the developed restoration plans. Replacement soil will meet background levels or SRLs for all constituents, at the discretion of the OSC.

19. Work Plan and Implementation.

- a. Respondent shall submit to EPA for approval, within five (5) days of the Effective Date, a draft Work Plan, including a schedule for implementation, for performing the Work generally described in Paragraph 18 above. The draft Work Plan shall provide a description of the actions that shall be required by this Settlement Agreement.
- b. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan and/or the proposed schedule in whole or in part. If EPA requires revisions, Respondent shall submit a revised draft Work Plan within five (5) days of receipt of EPA's notification of the required revisions. Respondent shall implement the Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement Agreement.
- c. Respondent shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondent shall not commence implementation of the

Work Plan developed hereunder until receiving written EPA approval pursuant to Paragraph 19(b).

20. Health and Safety Plan. Within five (5) days after the Effective Date, Respondent shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-site work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the implementation of the Work required by this Settlement Agreement.

21. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than three (3) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work.

22. Reporting.

a. Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement on the last day of each month after the date of receipt of EPA's approval of the Work Plan until termination of this Settlement Agreement, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall submit two (2) copies of all plans, reports or other submissions required by this Settlement Agreement or any approved work plan. Respondent shall also submit such documents in electronic form.

c. Respondent shall, at least thirty (30) days prior to the conveyance of any interest in real property it owns at the Site, give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Respondent shall require any such successors to comply with the immediately preceding sentence and Sections IX (Site Access) and X (Access to Information).

23. Final Report. Within thirty (30) days after completion of all Work required by this Settlement Agreement, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the National Contingency Plan ("NCP") entitled "OSC Reports." The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

24. Off-Site Shipments.

a. Respondent shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and

to the OSC. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards.

i. Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by this Paragraph as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. SITE ACCESS

25. If any property where access is needed to implement this Settlement Agreement is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the such property, for the purpose of conducting any activity related to this Settlement Agreement.

26. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use best efforts to obtain all necessary access agreements within ten (10) days after the Effective Date, or as otherwise specified in writing by the OSC. "Best efforts" means Respondent shall send a letter, which has been reviewed and approved by EPA, to the owner and tenant, if any, of the property to which access is sought that describes the process and purpose of the Work, the reasons access is needed, and includes a telephone contact number; and it means Respondent shall make an initial visit to each property to which access is sought and conduct at least two follow-up visits if necessary in order to secure access. The follow-up visits shall be conducted during weekday evening hours between 6:00 p.m. and 8:00 p.m. Respondent shall maintain a log in which it records its efforts to obtain access, including the date the letter was mailed, the time and dates of the initial and follow-up visits, and either the date of the response by the landowner or tenant, or the date EPA was notified of the failure of Respondent to obtain a response from the property owner or tenant. Respondent shall immediately notify EPA if after using best efforts it is unable to obtain such

agreements. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Oversight Costs).

27. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource, Conservation and Recovery Act ("RCRA"), and any other applicable statutes or regulations.

X. ACCESS TO INFORMATION

28. Respondent shall provide to EPA and the State, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to the Removal Action or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

29. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

30. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege in lieu of providing documents, Respondent shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

31. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XI. RECORD RETENTION

32. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate or individual retention policy to the contrary. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

33. At the conclusion of this document retention period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, Respondent shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

34. Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, Respondent has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since December 15, 2005 and that since that time it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. COMPLIANCE WITH OTHER LAWS

35. Respondent shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal

environmental or state environmental or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to EPA approval.

XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

36. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Property or the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of its unavailability, the Regional Duty Officer for the Region IX Emergency Planning and Response Branch, at (800) 300-2193, and the National Response Center at (800) 424-8802 of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Oversight Costs).

37. In addition, in the event of any release of a hazardous substance from the Property or the Site, Respondent shall immediately notify the OSC, or, in the event of its unavailability, the Regional Duty Officer for the Region IX Emergency Planning and Response Branch, at (800) 300-2193 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIV. AUTHORITY OF ON-SCENE COORDINATOR

38. The On-Scene Coordinator ("OSC") shall be responsible for overseeing Respondent's implementation of this Settlement Agreement. The OSC shall have the authority vested in an On Scene Coordinator by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

XV. PAYMENT OF OVERSIGHT COSTS

39. Payments for Oversight Costs.

a. Respondent shall pay EPA all Oversight Costs not inconsistent with the NCP incurred for the oversight of this Removal Action. On a periodic basis, EPA will send Respondent a bill

requiring payment that includes a SCORES Report or any succeeding report adopted by EPA, which includes direct and indirect costs incurred by EPA and its contractors for oversight of this Removal Action. Respondent shall make all payments within thirty (30) days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 41 of this Settlement Agreement.

b. Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment and EPA Site/Spill ID number 09JS. Respondent shall send the check(s) to:

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

c. At the time of payment, Respondent shall send notice that payment has been made to David Wood, MTS-42 USEPA, 75 Hawthorne Street, San Francisco, CA, 94105, and to Sheryl Bilbrey, USEPA, SFD-8-1, at the same street address.

d. The total amount to be paid by Respondent pursuant to Paragraph 39(a) shall be deposited in either the Asarco Hayden Plant Special Account, which is within the EPA Hazardous Substance Superfund, to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

40. In the event that the payments for Oversight Costs are not made within thirty (30) days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Oversight Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

41. Respondent may dispute all or part of a bill for Oversight Costs submitted under this Settlement Agreement, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 39 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 39(c) above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within ten (10) days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

42. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

43. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Oversight Costs, Respondent shall notify EPA in writing of its objection(s) within five (5) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have twenty (20) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

44. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Division Director level will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondent's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVII. FORCE MAJEURE

45. Respondent agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to Respondent's contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

46. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within twenty-four (24) hours of when Respondent first knew that the event might cause a delay. Within five (5) days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the

delay; Respondent's rationale for attributing such delay to a *force majeure* event if Respondent intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

47. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

48. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 49 and 50 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, the Work Plan, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement provided, however, that a failure of compliance caused by the refusal of a landowner other than Respondent to provide needed access despite Respondent's use of best efforts to secure such access shall not cause the accrual of penalties for any such uncompleted Work.

49. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 49(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1000	1st through 14th day
\$2000	15th through 30th day
\$5000	31st day and beyond

b. Compliance Milestones

- i. Submittal of Work Plan within five (5) days of the Effective Date.
- ii. Completion of all Work described in Paragraph 18 (a) – (f), by June 30, 2008.
- iii. Oversight Costs Payments as required by Paragraph 39.

50. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 22 and 23:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1000	15th through 30th day
\$2500	31st day and beyond

51. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 61 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of three times the cost of the Work performed by EPA.

52. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the (thirty-first) 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA Management Official at the Division Director level, under Paragraph 44 of Section XVI (Dispute Resolution), during the period, if any, beginning on the twenty-first (21st) day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

53. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

54. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

The certified or cashier's check shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 09JS, the EPA Docket Number 2008-09, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 39(c), and to Sheryl Billbrey, USEPA, SFD-8-1, 75 Hawthorne Street, San Francisco, CA, 94105.

55. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement Agreement.

56. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

57. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 54. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 61. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XIX. COVENANT NOT TO SUE BY EPA

58. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Oversight Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the

complete and satisfactory performance by Respondent of all obligations under this Settlement Agreement, including, but not limited to, payment of Oversight Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

59. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

60. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definition of Oversight Costs;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

61. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in the performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the

Work pursuant to this Paragraph shall be considered Oversight Costs that Respondent shall pay pursuant to Section XV (Payment of Oversight Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENT

62. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Oversight Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the California Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 64 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 60(b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

63. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

64. Respondent agrees not to assert any claims and to waive all claims or causes of action that Respondent may have for all matters relating to the Removal Site, including for contribution, against any person where the person's liability to Respondent with respect to the Removal Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Removal Site, or having accepted for transport for disposal or treatment of hazardous substances at the Removal Site, if

a. The materials contributed by such person to the Removal Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Removal Site by such person contributed or could contribute significantly to the costs of response at the Removal Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against Respondent.

XXII. OTHER CLAIMS

65. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States and/or EPA shall not be deemed a party to any contract entered into by Respondent or Respondent's employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

66. Except as expressly provided in Section XXI, Paragraph 64, and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

67. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION

68. The Parties agree that this Settlement Agreement constitutes an administrative settlement pursuant to Section 113(f)(2), 42 U.S.C. §§ 9613(f)(2), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work performed pursuant to this Settlement Agreement and the payment of Oversight Costs pursuant to this Settlement Agreement. Except as provided in Section XXI, Paragraph 64, of this Settlement Agreement, nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands for indemnification, contribution or cost recovery against any persons not parties to this Settlement Agreement. The Parties agree that this Settlement Agreement constitutes an administrative settlement for the purposes of CERCLA Section 113(f)(3)(b), 42 U.S.C. § 113(f)(3)(b), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the Work and Oversight Costs. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. §§ 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements providing contribution protection pursuant to Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

XXIV. INDEMNIFICATION

69. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, or Respondent's employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorney's fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, or Respondent's employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

70. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

71. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXV. INSURANCE

72. At least seven (7) days prior to commencing any on-Site work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of \$1,000,000 (one million dollars), combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

73. For purposes of this Settlement Agreement, financial assurance for the completion of the Work shall take the form of earmarked funds from the Asarco Environmental Trust.

XXVII. MODIFICATIONS

74. The OSC may make modifications to any plan or schedule or to the Work Plan in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the Parties.

75. If Respondent seeks permission to deviate from any approved work plan or schedule or the Work Plan, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to the previous Paragraph.

76. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of the obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. NOTICE OF COMPLETION OF WORK

77. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

XXIX. SEVERABILITY/INTEGRATION/APPENDICES

78. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondent has sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondent shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

79. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following attachment is attached to and incorporated into this Settlement Agreement: Attachment 1, Removal Action Memo.

XXX. EFFECTIVE DATE

80. This Settlement Agreement shall be effective two (2) days after the Settlement Agreement is signed by the Superfund Branch Chief.

The undersigned representative of Respondent certifies that s/he is fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind the party s/he represents to this document.

Agreed this 14th day of March, 2008.

For Respondent _____

By: D E McAllister

Title: Executive Vice President

For Respondent _____

By: R. C. Hill

Title: VP Env. Affairs

It is so Ordered and Agreed this 19 day of March, 2008.

BY: [Signature]

Daniel Meer

Branch Chief, Superfund

U.S. Environmental Protection Agency, Region IX

DATE: 19 March 2008